STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Supreme Court No. 151899

v

ERNESTO EVARISTO URIBE,
Defendant-Appellant.

Trial Court No. 13-020404
Court of Appeals No. 321012

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Exclusion of relevant evidence under MRE 403 is an extraordinary remedy, to be applied sparingly and with caution. Is propensity evidence relevant under MCL § 768.27a prejudicial if not substantially similar in detail to the charged offense, and in the weighing of probative value against unfair prejudice, may the credibility of the other-act witness be assessed by the trial judge?

Amicus answers: NO

Statement of Facts

Amicus joins the Statements of Facts in the People's opposition and supplemental response.

Argument

I.

Exclusion of relevant evidence under MRE 403 is an extraordinary remedy, to be applied sparingly and with caution. Propensity evidence relevant under MCL § 768.27a is not prejudicial simply because not substantially similar in detail to the charged offense, similarity going only to the strength of the probative inference, and thus to weight; further, in the weighing of probative value against unfair prejudice the credibility of the other-act witness cannot be assessed by the trial judge.

A. Introduction

This Court has directed that the parties file supplemental briefs "addressing whether the Eaton Circuit Court abused its discretion in denying the admission of testimony offered under MCL 768.27a and whether the Court of Appeals properly applied *People v Watkins*, 491 Mich 450 (2012), in reversing the circuit court."[1] Amicus submits that the trial court did abuse its discretion, and particularly directs its efforts to the proper application of *Watkins*, specifically to the application of MRE 403 to the statute, as to which, amicus suggests, it would not be inappropriate for the Court to provide some further explication.

B. The statute and principles of relevance

MCL§ 768.27a provides that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor *is* admissible and *may* be considered for its bearing on any matter to which

[1] *People v. Uribe*, __Mich.__, 869 N.W.2d 861 (2015).

it is relevant."[2] In *Watkins*, this Court said that this language allowing admission of evidence of another listed offense "'for its bearing on any matter to which it is relevant' permits the use of evidence to show a defendant's character and propensity to commit the charged crime."[3] So by what standard is it determined that the evidence of the other listed act is relevant to show propensity, propensity itself plainly being relevant, in the charged case? MRE 401 sets the measure: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

This standard is highly inclusionary,[4] as its threshold is extremely low. The Committee Comment to MRE 401 points out that the definition of relevance contained in the rule is consistent with prior Michigan law, and indeed, the principles stated in the rule have roots deep in Michigan jurisprudence. For example, in *Beaubien v Cicotte*[5] certain evidence in a will contest was disallowed at trial, and the Supreme Court, speaking through Justice Campbell, held that the "refusal was correct. It does not appear to have had *any bearing whatever upon any part of the controversy*."[6] That the evidence did not have "any bearing whatever upon any part of the controversy" is another way of saying, in the language of the rule, that it had no "tendency to make the existence of any fact

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[2] Emphasis supplied.

[3] *People v. Watkins*, 491 Mich. 450, 470 (2012).

[4] See e.g. *United States v. Thomas*, 987 F.2d 697, 706 (CA 11, 1993) ("The Federal Rules of Evidence generally favor the inclusion rather than the exclusion of evidence. Rules 401, 402, and 403"). See also

[5] *Beaubien v. Cicotte*, 12 Mich. 459 (1864).

[6] *Beaubien v. Cicotte*, 12 Mich. at 484.

. . . of consequence . . . more probable or less probable than it would be without the evidence." Similarly, Justice Cooley wrote for the court in *Stroh v Hinchman*[7] that certain evidence was irrelevant for the point it sought to prove, stating the general rule that "All evidence should have *some* legitimate tendency to establish or disprove the fact in controversy, and whatever has no such tendency should be rejected."[8] Modern Michigan cases make much the same point. In considering the admissibility of allegedly "gruesome" photographs, this Court in *People v Mills*[9] held with regard to the probative force component of relevance that "'*any' tendency* is sufficient probative force." With regard to the admissibility of particular uncharged misconduct evidence of the defendant under MRE 404(b), the Court in *People v. VanderVliet*[10] held that the evidence must be relevant for a noncharacter purpose in order to be admissible, the question being "[d]oes the item of evidence *even slightly* increase or decrease the probability of the existence of any material fact in issue? Standing alone, the item of evidence need not have sufficient probative value to support a finding that the fact exists. So long as the item of evidence affects the balance of probabilities *to any degree*, the item is logically relevant."[11]

Evidence of another listed act committed by the defendant is relevant, then, if it has "any tendency" to increase the probability that defendant has a propensity to molest children sexually.

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[7] *Stroh v. Hinchman*, 37 Mich. 490 (1877).

[8] *Stroh v. Hinchman*, 37 Mich. at 496. See also *Stewart v. People*, 23 Mich. 63 (1871).

[9] *People v. Mills*, 450 Mich. 61, 68 (1995) (emphasis added).

[10] *People v. VanderVliet*, 444 Mich. 52, 60-61 (1993).

[11] *People v VanderVliet*, 444 Mich at 60, fn 8 (emphasis supplied), the court quoting from Imwinkelried, *Uncharged Misconduct Evidence,* § 2:17, p. 45.

But while relevant evidence is admissible under MRE 402, all evidence is subject to the safety valve of MRE 403. How, then, is MRE 403 to be applied? First, however, what did *Watkins* say regarding application of MRE 403 to evidence offered under the statute, and what did the Court of Appeals say concerning it in the present case?

C. MRE 403 and the exclusion of relevant evidence

1. *People v. Watkins*

MRE 403 provides that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The rule, then, refers to probative value being "outweighed," and *substantially* so, before relevant evidence can be excluded on one of the listed grounds, and so a balancing or weighing on two sides of a scale is suggested, with probative evidence under the inclusionary standard of MRE 401 only subject to exclusion if the scales tip substantially when identified unfair prejudice is laid on the other side. This Court in *Watkins* made plain that the propensity inference that arises logically from evidence of other listed acts, ordinarily forbidden by the law under MRE 404(a) and MRE 404(b)(1), and thus on the "prejudicial" side of the scale, is, with listed acts committed against minors, under the statute instead on the *probative* side of the scale:

> As with any balancing test, MRE 403 involves two sides of a scale—a probative side and a prejudicial side. . . . were a court to apply MRE 403 in such a way that other-acts evidence in cases involving sexual misconduct against a minor was considered on the prejudicial side of the scale, this would gut the intended effect of MCL 768.27a, which is to allow juries to consider evidence of other acts the defendant committed to show the defendant's character and propensity to commit the charged crime. To weigh the propensity inference derived from other-acts evidence in cases involving sexual

> misconduct against a minor on the prejudicial side of the balancing test would be to resurrect MRE 404(b), which the Legislature rejected in MCL 768.27a.
>
> MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. That is, other-acts evidence admissible under MCL 768.27a *may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference*. In reaching this conclusion, we join several federal courts that have addressed this issue with respect to FRE 414 and 403.[12]

And this Court also held in *Watkins* that MRE 403 is applicable to evidence offered under MCL § 768.27a, and offered some guidance as to how the weighing[13] of probative value—which must be substantially outweighed—against unfair prejudice is to be accomplished:

> There are several considerations that may lead a court to exclude such evidence. These considerations include (1) *the dissimilarity between the other acts and the charged crime*, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) *the lack of reliability* of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony.[14]

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[12] *People v. Watkins*, 491 Mich. at 486 (emphasis supplied).

[13] When raised by the opponent of the evidence, as here. MRE 403 is not self-executing. See e.g. Louis A. Jacobs, "Evidence Rule 403 After United States v. Old Chief," 20 Am. J. Trial Advoc. 563, 567 (1997) ("Through the passive voice, Rule 403 dictates that the opponent carry the burden of convincing the trial judge to exclude the evidence"); *United States v. Tse*, 375 F.3d 148, 164 (CA 1, 2004) "The burden under Rule 403 is on the party opposing admission, who must show that the probative value 'is *substantially outweighed* by the danger of *unfair prejudice.*'" (emphasis in original). And see 2 Graham, *Handbook of Federal Evidence*, § 403.1.

[14] *People v. Watkins*, 491 Mich. at 487 (emphasis supplied).

2. The Court of Appeals' decision

In the present case, the Court of Appeals observed that the trial court found the other act here "too dissimilar" to the charged act, and said that "[s]imilarity, or lack thereof, between another criminal act and the charged crime, is a comparison courts frequently make to assess whether evidence of the other criminal act is admissible to show something other than a defendant's criminal propensity under MRE 404(b). *Whether an act is similar or dissimilar to a charged offense does not matter for the purposes of MRE 403*, which, as noted, looks to whether otherwise relevant evidence is overly sensational or needlessly cumulative. More importantly, MCL 768.27a clearly mandates the admissibility of *any evidence* of a 'listed offense,' regardless of similarity. Indeed, the similarity element is presumed in the mandate to admit evidence of a listed offense."[15] The court continued that in the MRE 403 analysis the trial court under the statute must "weigh the probative value of the evidence—i.e., its tendency to show defendant's propensity to commit sex crimes against children—in *favor* of admission."[16]

3. Principles of application of MRE 403

a. The principle of multiple inferences and the rule of limited admissibility

The rules of evidence, including MRE 403, favor admissibility.[17] As noted, to be relevant, evidence need only have *any* tendency in logic to make a fact of consequence more probable or less

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[15] *People v. Uribe*, __Mich. App.__, 2015 WL 2214706 (May 12, 2015) (first emphasis added; second emphasis in the original).

[16] *People v. Uribe*, __Mich. App.__, 2015 WL 2214706 (May 12, 2015) (emphasis in the original).

[17] 1 Robinson, Longhofer, and Ankers, *Michigan Court Rules Practice: Evidence* § 4.03.2, p.319.

probable than it would be *without the evidence*. Often multiple inferences can logically be drawn from a piece of evidence, one of which has some tendency to make a fact of consequence more probable or less probable than it would be without the evidence, but one of which goes to some fact which is not admissible under the law. The default rule of the law of evidence is that in this circumstance the evidence should be admitted, subject to a limiting instruction as to its proper use.[18] The safety valve for those situations where the risk that the jury will disregard a limiting instruction and put the evidence to an improper use is too great is MRE 403, but there must *be* an impermissible use to which the evidence might be put under what might be termed the "principle of multiple inferences," else there is nothing on the prejudicial side of the scale. Critically, unless "trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing."[19] Exclusion of evidence which its proponent has demonstrated has probative force as to a fact of consequence is thus an extraordinary remedy,[20] and the burden of persuasion is, as has been said, on the party *opposing* admission of the evidence.[21]

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[18] See MRE 105: "When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

[19] *United States v McRae*, 593 F2d 700, 707 (CA 5, 1979). And see *People v Wilson*, 252 Mich App 390 (2002).

[20] 2 Graham, *Handbook of Federal Evidence*, § 403.1, p.715-716; 1 Robinson, Longhofer, and Ankers, *Michigan Court Rules Practice: Evidence* §4.03.2, p.319 ("...it is only in unusual circumstances that the trial court should exclude relevant evidence under MRE 403").

[21] 2 Graham, *Handbook of Federal Evidence*, § 403.1, p.717.

b. In the weighing process the trial judge may not act as jury, assessing the credibility of the other-act witness; credibility and reliability are different concepts

Where the evidence proffered *is* subject to multiple inferences, one of which is improper under the law so that MRE 403 weighing is appropriate, the trial judge undertaking the weighing "reviews the disputed evidence in 'the light most favorable to its proponent, *maximizing its probative value and minimizing its prejudicial effect*.'"[22] This is so because, as must always be remembered, exclusion of relevant evidence under MRE 403 is an "extraordinary remedy,"[23] and the judge must, much as with a motion for directed verdict, hypothesize how the jury might consider the evidence; that is, give it its maximum possible probative weight, as the jury might, and its minimum prejudicial weight, again, as the jury might. Here, then, the trial court must maximize the propensity inference drawable from the evidence, and minimize whatever prejudicial inference might be drawn. *None was identified here*, and, as will be discussed subsequently, "dissimilarity" goes to the weight of the probative inference of propensity, not to prejudice.

Because the trial judge must hypothesize in this fashion the uses to which the jury might put the evidence, the judge may not act as jury and make credibility determinations with regard to the evidence; rather, "the trial judge must assume the evidence will be believed by the trier of fact."[24] As has cogently been put by a number of federal courts, "'Rule 403 does not permit exclusion of evidence because the trial judge does not find it credible . . . . Weighing probative value against unfair prejudice means probative value with respect to a material fact *if the evidence is believed, not*

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[22] *United States v Thomas*, 74 F3d 676, 679 (CA 6, 1996)(emphasis added).

[23] 2 Graham, *Handbook of Federal Evidence*, § 403.1, p.715-716.

[24] 2 Graham, *Handbook of Federal Evidence*, § 403.1, p. 722..

the degree the court finds it believable. "[25] For example, one federal district court discounted the probative value of proffered testimony on the basis of the court's view of the credibility of the witness, and on appeal the circuit court of appeals said that this was "an improper basis for discounting [the witness's] testimony's probative value," for "the credibility of a witness has *nothing to do with whether or not his testimony is probative* with respect to the fact which it seems to prove."[26]

But does not *Watkins*, relying on a number of federal cases, refer to "reliability" as an appropriate factor in the weighing process? Indeed it does, saying that the trial judge may consider "the lack of reliability of the evidence supporting the occurrence of the other acts." But credibility and reliability are different concepts. Credibility concerns the believability of a witness, but "[u]nlike 'credibility,' reliability does not concern the believability of witness. 'Reliability' concerns the inherent quality of evidence."[27] For example, an eyewitness testifying to an identification may be credible, but the identification excluded as unreliable because of an impermissibly suggestive identification procedure. Hypnotically refreshed testimony provides another example.[28] And in a case like the present one, the evidence offered to prove the defendant committed the other act might

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[25] *Ballous v. Henri Studios, Inc.*, 656 F.2d 1147, 1154 (CA 5, 1981) (emphasis in the original); *United States v. Thompson*, 615 F.2d 329, 333 (CA 5, 1980); *Bowden v. McKenna*, 600 F.2d 282, 284-285 (CA 1, 1979).

[26] *United States v. Bergrin*, 682 F.3d 261, 280 (CA 3, 2012) (emphasis supplied). See also 22 Charles Alan Wright & Kenneth W Graham, Jr., *Federal Practice and Procedure* § 5214 (4th Ed., 1996) ("It seems relatively clear that in the weighing process under Rule 403 the judge cannot consider the credibility of witnesses").

[27] Robert Rosenthal, 22 Developmental Review 334-369 (2002).

[28] See *People v. Gonzalez*, 415 Mich. 515 (1982).

be a DNA match. Though the expert testifying to the match might be credible, if the sample had been compromised the evidence might be excluded nonetheless as unreliable. There is no unreliable evidence here showing the other listed act, but only the credibility of the witness, which is not for the judge to assess in the MRE 403 weighing.

c. The dissimilarity or similarity of the listed other act goes to the weight of its probative inference as to propensity; dissimilarity does not go to prejudice

In *Watkins* this Court said that among the appropriate factors in MRE 403 weighing is "the dissimilarity between the other acts and the charged crime," while the Court of Appeals here said that "[w]hether an act is similar or dissimilar to a charged offense does not matter for the purposes of MRE 403." On its face, the language of the Court of Appeals appears to contradict that which this Court said in *Watkins* constitutes an appropriate factor in MRE 403 weighing, but on close review the statement of the Court of Appeals is at worst inartful; further, some clarification of *Watkins* here would be of aid to the bench and bar. This Court in *Watkins* listed "several considerations that may lead a court to exclude" propensity evidence brought under the statute, including "(1) the dissimilarity between the other acts and the charged crime . . . ." This might be read to mean that dissimilarity of the other-act amounts to some form or prejudice, but it should not and cannot. While it might be true that the more similar to the charged offense are the facts of the other act, the greater probative force the other act carries with regard to showing propensity, itself relevant, the baseline relevance of the other act is established by showing that it is a listed act committed against a minor. The Court of Appeals is correct that "the similarity element is presumed in the mandate to admit evidence of a listed offense"; that is, sufficient similarity exists because the act was a *listed act* and it was committed against a *child*. Under MRE 404(b) where an other act is offered on identity some

sort of "signature" similarity is required to show that the same person committed both acts,[29] but the evidence here is not MRE 404(b) evidence. The legislature has determined that the fact that the listed act was committed against a child establishes probative force as to propensity, precisely because a child is involved, and a very small number of the population engages in this abuse. And as federal courts have said with regard to the parallel federal rule, "[c]onsistent with congressional intent regarding the admission of evidence tending to show the defendant's propensity to commit sexual assault or child molestation, 'courts are to 'liberally' admit evidence of prior uncharged sex offenses.'"[30]

And so the Court of Appeals is correct that a showing that the act is a listed act against a minor establishes relevance; again, the degree of similarity goes only to the strength of the inference, "any tendency" at all being enough to establish relevance under MRE 401. But the Court of Appeals was inartful in saying that "[w]hether an act is similar or dissimilar to a charged offense does not matter for the purposes of MRE 403," for the strength of the probative inference is something on the *probative* side of the scale when MRE 403 balancing is done. The evidence may weigh more or less greatly, but remains *always* on the probative side of the scale. The less strong the inference, the more it is possible that the extraordinary remedy of exclusion of the evidence can be justified in a weighing of that inference against unfair prejudice. But unfair prejudice there must be, which is unlikely in the extreme in the case of relevant propensity evidence, for that which ordinarily might show prejudice—the propensity inference—weighs on the probative side of the scale. The opponent of the evidence must demonstrate unfair prejudice that outweighs, and substantially, the probative

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[29] See *People v. Golochowicz*, 413 Mich. 298 (1982).

[30] *United States v. Meacham,* 115 F.3d 1488, 1492 (CA 10, 1997).

force, of whatever strength, of the propensity inference, and *no unfair prejudice has been identified here.*

In sum, credibility may not be considered by the trial judge in the MRE 403 weighing process, and reliability is not an issue here.[31] And similarity goes to the weight of the inference on the probative side of the scale; the trial court here identified a lack of what it viewed to be a sufficient degree of similarity as prejudice, when the court was simply at most identifying the weight of the probative inference *to be weighed* against unfair prejudice, without identifying *any* unfair prejudice against which to weigh it. This Court should make clear to trial and appellate courts that similarity or dissimilarity goes to the weight of the probative inference of propensity, not prejudice, and that considerations of credibility of the other-act witness can play no part in MRE 403 weighing.

D. Application and conclusion

The trial judge here abused her discretion by misapplying MRE 403. The trial judge impermissibly considered the credibility of the other-act witness as the judge assessed it , doubting the evidence in saying the child had been "all over the place" in her statements. And the court viewed the weight of the probative inference of propensity—the degree of similarity—as itself allowing preclusion, rather than constituting simply the degree of weight on the probative side of the scale, without weighing it *against* anything on the unfair prejudice side of the scale, saying that the evidence is only admissible—only has probative value—when markedly similar ("the purpose of [MCL 768.27a] honestly is to allow in other allegations that are more similar in nature to show a

[31] Corroboration is no longer required in cases of sexual assault, and one would hope it is not back-doored as a requirement for proof of other-act evidence under MCL § 768.27a.

propensity; see, this is what the defendant does, this is what the defendant does)."[32] This trial judge failed to weigh the propensity inference, of whatever strength, against any identified unfair prejudice on the other side of the scale, and so in this way also abused her discretion.

[32] And the acts here are not markedly dissimilar. That the defendant did not attempt identical sexual acts does not greatly diminish the probative inference of propensity, and in any event goes only to weight of that inference, not to prejudice.

Relief

Wherefore, amicus submits that the Court of Appeals should be affirmed.

Respectfully submitted,

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